

1 Brian E. Pastuszenski (*pro hac vice*)
bpastuszenski@goodwinprocter.com
2 Inez Friedman-Boyce (*pro hac vice*)
ifriedmanboyce@goodwinprocter.com
3 Brian C. Devine (SBN 222240)
bdevine@goodwinprocter.com
4 Caroline H. Bullerjahn (*pro hac vice*)
cbullerjahn@goodwinprocter.com
5 **GOODWIN PROCTER LLP**
Exchange Place
6 Boston, MA 02109-2802
Tel.: 617-570-1000
7 Fax: 617-570-1231

8 Lloyd Winawer (SBN 157823)
lwinawer@goodwinprocter.com
9 **GOODWIN PROCTER LLP**
601 South Figueroa Street, 41st Floor
10 Los Angeles, California 90017
Tel.: 213-426-2500
11 Fax: 213-623-1673

12 *Attorneys for Defendants*
Countrywide Financial Corporation,
Countrywide Home Loans, Inc.,
Countrywide Home Loans Servicing LP,
Countrywide Capital Markets, LLC,
Countrywide Securities Corporation,
CWALT, Inc., CWABS, Inc., CWHEQ,
15 Inc., and CWMBS, Inc.
16

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 IN re COUNTRYWIDE FINANCIAL
20 CORP. MORTGAGE-BACKED
21 SECURITIES LITIGATION CASES

Case No. 11-ML-02265-MRP (MANx)

COUNTRYWIDE DEFENDANTS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
THEIR MOTION TO DISMISS
PLAINTIFFS' AMENDED
COMPLAINT

23 Date/Time: May 17, 2012 / 11:00 a.m.
24 Courtroom: 12
Judge: Hon. Mariana R. Pfaelzer

25 THRIVENT FINANCIAL FOR
26 LUTHERANS, *et al.*,
27 Plaintiffs,

28 V.

Case No. 11-CV-07154-MRP (MANx)

1 COUNTRYWIDE FINANCIAL
2 CORPORATION, *et al.*,

3 Defendants.
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PRELIMINARY STATEMENT

2 On March 9, 2012, Plaintiffs filed an amended complaint in this matter. On
3 February 17, 2012, the Court previously dismissed the following claims without
4 prejudice: (1) fraudulent misrepresentation, reckless misrepresentation, and
5 fraudulent inducement claims that concern title transfer allegations; (2) aiding and
6 abetting fraud claims against all Defendants; (3) negligent misrepresentation claims
7 against all Defendants; and (4) successor liability claims against the Bank of
8 America Defendants.¹ *See Order re: Motions to Dismiss*, dated February 17, 2012,
9 Docket No. 170 (“Dismissal Order”). The Amended Complaint states that Plaintiffs
10 opted only to amend their successor liability claims and no others, and that they
11 repeated (but did not amend) their previous negligent misrepresentation, aiding and
12 abetting, and transfer of title-related claims that the Court had dismissed without
13 prejudice “solely and exclusively to preserve [their] appellate rights.” Amended
14 Complaint (“AC”) at 1 n.1. Because Plaintiffs chose not to amend these claims,
15 they should now be dismissed *with prejudice*.

ARGUMENT

I. THE NEGLIGENT MISREPRESENTATION, AIDING AND ABETTING, AND TITLE TRANSFER CLAIMS MUST BE DISMISSED WITH PREJUDICE.

19 In the Dismissal Order, the Court dismissed Plaintiffs’ aiding and abetting
20 claims for failure to plead the required element of substantial assistance (Dismissal
21 Order at 10-11), the negligent misrepresentation claims for failure to plead a duty of
22 care under Minnesota law and “any facts from which the Court could infer that the
23 transaction was other than an arms-length business transaction between equals” (*id.*
24 at 11-12), and the fraudulent misrepresentation, reckless misrepresentation, and
25 fraudulent inducement claims, to the extent such claims are premised on transfer of

²⁷ ²⁸ ¹ The Bank of America Defendants are Bank of America Corp., BAC Home Loans Servicing, LP, and NB Holdings Corporation. AC ¶ 28-31.

1 title allegations, because Plaintiffs' title transfer allegations "fail to identify a
2 misstatement with sufficient particularity" (*id.* at 10).

3 Plaintiffs acknowledge these dismissals in the Amended Complaint, stating
4 that they have "not amended those claims, but [have] included them . . . solely and
5 exclusively to preserve [their] appellate rights." AC at 1 n.1. These claims thus still
6 appear in the Amended Complaint. *See id.* ¶¶ 288-93 (aiding and abetting fraud); *id.*
7 ¶¶ 294-308 (negligent misrepresentation); *id.* ¶¶ 166-67² (title transfer). Because
8 this Court has already held these claims to be inadequately pled,
9 Plaintiffs' decision not to amend them requires that they now be dismissed with
10 prejudice. The Ninth Circuit's words in *Pratts v. Sujan*, 176 F.3d 484, 1999 WL
11 274662, at *1 (9th Cir. Apr. 23, 1999), are controlling here:

12 [Plaintiff] was given leave to amend his claims by the district court, as
13 well as instruction on what he needed to allege to state valid claims,
14 but [plaintiff] chose not to amend. This failure means his . . . claims
15 are now dismissed with prejudice.

16 *Cf. Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004) ("[T]he
17 district court should have taken the election not to amend at face value" and
18 "entered a final judgment dismissing all claims with prejudice."); *London v.*
19 *Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) (district court "acted
20 properly" when it dismissed plaintiff's cause of action on the basis that plaintiff
21 "failed to amend" the claim in her amended complaint); *see also Dietz v. Beneficial
22 Loan & Thrift Co.*, 2011 WL 6739504, at *3 (D. Minn. Dec. 22, 2011) ("Plaintiffs
23 have failed to amend their [Truth in Lending Act] claims so as to adequately allege a

24
25 ² While Plaintiffs' Amended Complaint contains allegations regarding title transfer
26 misrepresentations (AC ¶¶ 166-67), Plaintiffs deleted from their Amended
27 Complaint an entire section (22 paragraphs) of allegations entitled "Countrywide
and GMAC Failed To Ensure That Title To The Underlying Loans Was Effectively
Transferred" that appeared in the original complaint. *Compare* Compl. ¶¶ 167-89
with AC ¶¶ 166-67. Thus, the title transfer allegations in the Amended Complaint
are even *more* deficient than those that the Court already found to be insufficient.

1 claim for rescission. Accordingly, Plaintiffs' rescission claims are properly
2 dismissed [with prejudice]."). As such, the Court should dismiss Plaintiffs'
3 fraudulent misrepresentation, reckless misrepresentation, and fraudulent inducement
4 claims (to the extent they are premised on transfer of title allegations), as well as
5 their aiding and abetting and negligent misrepresentation claims, with prejudice.

6 **CONCLUSION**

7 For all the reasons set forth above, the Countrywide Defendants respectfully
8 request that the Court dismiss with prejudice Plaintiffs' negligent misrepresentation
9 claims, aiding and abetting claims, and remaining fraudulent misrepresentation,
10 reckless misrepresentation, and fraudulent inducement claims based on title transfer
11 allegations.

12 Dated: March 30, 2012

GOODWIN PROCTER LLP

13 /s/ Brian E. Pastuszenski
14 Brian E. Pastuszenski (*pro hac vice*)
15 Lloyd Winawer (State Bar No. 157823)
16 Inez H. Friedman-Boyce (*pro hac vice*)
Brian C. Devine (State Bar No. 222240)
Caroline H. Bullerjahn (*pro hac vice*)

17 *Counsel for the Countrywide Defendants*

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